

NEWS



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State of New Jersey
Department of Labor
PO Box 110
Trenton, New Jersey
08625-0110

Notice of Proposed Amendment

RE:
DIVISION OF EMPLOYER ACCOUNTS
Contributions, Records and Reports
Transfer of Employment Experience
Transfer of Predecessor's Experience in Part
Proposed Amendment: N.J.A.C. 12:16-18.3

Attached please find the above-referenced matter which was published in the June 7, 2004 New Jersey Register.

If you have any questions, please contact Frederick S. Cohen, Regulatory Officer at (609) 777-2960.

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Attachment

LABOR

(a)

DIVISION OF EMPLOYER ACCOUNTS

Contributions, Records and Reports

Transfer of Employment Experience

Transfer of Predecessor's Experience in Part

Proposed Amendment: N.J.A.C. 12:16-18.3

Authorized By: Albert G. Kroll, Commissioner, Department of Labor.

Authority: N.J.S.A. 43:21-1 et seq.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2004-229.

A public hearing on the proposed amendments will be held on the following date at the following location:

Tuesday, June 22, 2004

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor

John Fitch Plaza

13th Floor Auditorium

Trenton, New Jersey 08625-0110

Please call the Office of Regulatory Services (609) 984-3620 if you wish to be included on the list of speakers.

Submit written comments by August 6, 2004 to:

Frederick S. Cohen, Regulatory Officer

Office of Regulatory Services

New Jersey Department of Labor

13th Floor, Suite G, PO Box 110

Trenton, New Jersey 08625-0110

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The agency proposal follows:

Summary

N.J.S.A. 43:21-7(c)(7)(A), (B) and (C) of the New Jersey Unemployment Compensation Law relate to transfers of an employer's organization, trade or business, or assets to a successor in interest, whether by merger, consolidation, sale, transfer, descent or otherwise. In that regard, the statute also provides for the transfer of the employment experience (tax contributions paid, benefits charged, average payroll of the preceding three to five years) of the predecessor employer to the successor in interest if it is determined by the Department of Labor that the experience of the predecessor employer with respect to the organization, trade or business, or assets which has been transferred may be considered indicative of the future employment experience of the successor in interest. The experience rating of an employer serves as the basis for determining the level of contributory taxes (unemployment insurance and temporary disability insurance) which the employer must remit to the Department on behalf of its employees. Thus, the lower one's experience rating is, the lower the amount of the tax contributions due and, conversely, the higher the experience rating, the higher the amount of tax contributions due.

In light of the foregoing, the Department has had to deal with attempts by certain employers to obtain the lowest contributory tax rate via manipulation of the experience rating system. This, in turn, results in significant

underpayment by those employers of contributory taxes. Aside from the obvious illegality of such conduct, the result thereof is to place the finances of law-abiding employers at risk since it would be they who would have to compensate for the financial shortfall to the State's trust funds. The inequity of such a result is both manifest and unacceptable and is made even more so in time of severe budgetary constraints. Therefore, the Department has determined that Subchapter 18 of N.J.A.C. 12:16, which deals specifically with the transfer of employment experience, must be clarified and strengthened.

In order to achieve that result, N.J.A.C. 12:16-18.3(a)1 has been amended to read that either the predecessor or successor in interest shall report the transfer and acquisition in part of the employer's organization, trade or business, or assets within 120 days from the date of acquisition. Previously, one had to report the transfer and acquisition "... and its intention to apply for a partial transfer of the employer experience" and to do so within "... four calendar months after the date ..." of acquisition. The proposed amendment thus removes the conditionality which is implied by the use of "intention to apply" and makes the requirement to report the transfer and acquisition and to request a partial transfer of the employment experience mandatory within the 120-day period set forth in the proposed amended rule.

Likewise, N.J.A.C. 12:16-18.3(a)2, which had hitherto provided that both the predecessor and the successor in interest must complete and file form UC-47 within "30 days from the date of mailing thereof," has been amended to require that the aforementioned form be completed within 120 days of the date of the acquisition.

In addition to the latter proposed amendments, the Department is proposing to create three new subsections to N.J.A.C. 12:16-18.3. The proposed subsection (c) provides that, as used in this section, the term "distinguishable" means the portion of the organization, trade or business, or assets acquired by the successor in interest must be recognizable as distinct and different from the organization, trade or business, or assets remaining with the predecessor. The acquired portion must be able to operate as an employing unit apart from the predecessor, such as an entire operating division or a sales or production function. The proposed subsection (d) provides that the term "identifiable" means the part of the organization, trade or business, or assets acquired by the successor in interest must have definitive characteristics that separate it from the predecessor and it must be recognizable by those characteristics as unique and different from the predecessor. Lastly, the proposed subsection (e) makes clear that a successor in interest shall not be entitled to a partial transfer of employment experience and will be assigned the new employer rate if: 1) the predecessor in interest transfers a portion of its business activity to form a new employing unit while maintaining ownership or control either directly or indirectly of the new employing unit, and 2) the portion of the organization, trade or business, or assets acquired by the successor in interest is not distinguishable and identifiable from those remaining with the predecessor. In sum, the proposed amendments to N.J.A.C. 12:16-18.3 will make it less likely that those persons who attempt to manipulate their contributory tax experience ratings will succeed in so doing.

Because the Division has provided a 60-day comment period on this notice of proposal, this notice is exempted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The proposed amendments will produce a positive social impact in that they clarify requirements for partial transfers of employment experience and insure all employers a tax rate based on the employment experience developed by that employer. The amendments also clarify previously undefined key terms related to partial transfers that had enabled an employer to manipulate tax rates unrelated to employment experience factors as envisioned and dictated by the statute. The result was a limited number of employers significantly under-paying unemployment and temporary disability insurance contributions, and potentially causing tax increases to be borne by the general employer population. This clarification will improve compliance and maintain fairness in tax obligations required of all employers under the New Jersey Unemployment Compensation and Temporary Disability Benefits Laws.

Economic Impact

The Department believes these amendments will not cause any negative economic consequences. The positive economic impact, as detailed in the Social Impact above, will be a reduction in the underpayment of unemployment and temporary disability contributions, resulting in improved compliance and tax fairness for all employers. All employers will be paying contributions based on employment experience factors as set forth in N.J.S.A.

43:21-7. In addition, the costs associated with recordkeeping and preparing and producing quarterly reports will remain unchanged.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendments are not subject to any Federal requirements or standards.

Jobs Impact

The Department believes that the proposed amendments are job neutral and will not result in the generation or loss of any jobs.

Agriculture Industry Impact

The proposed amendments will have no impact on the agriculture industry.

Regulatory Flexibility Analysis

The proposed amendments do not impose additional burdens on the employer community. They, however, create new temporal compliance requirements. Thus, heretofore, a predecessor or successor interest was required to report the transfer of the predecessor's experience within four calendar months after the date of the acquisition. The proposed amended rule requires that the report be made within 120 days from the date of the acquisition. Likewise, it had been required that the predecessor in interest and the successor in interest must both complete and file a form UC-47 within 30 days from the date of the mailing thereof. The proposed amendments would require that the later occur within 120 days from the date of acquisition. The proposed amendments thus impose new compliance requirements on all businesses in New Jersey including those which are deemed to be small businesses as defined in the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq. The requirements, as noted, have changed the timeframes within which a notice of transfer of the experience rating of a predecessor in interest must be accomplished. The change, however, is minimal and will not cause businesses to be burdened thereby. The proposed change of timeframe within which to complete and file a tax form UC-47 has been quadrupled and that should inure to the benefit of all businesses by allotting them a greater degree of temporal flexibility in adhering to the requisite filing requirements.

Smart Growth Impact

The proposed amendments will not have an impact on the growth, development or redevelopment of the State's urban or suburban areas with regard to existing or proposed land use, protection of open space or transportation. Therefore, the proposed amendments will not impact the achievement of smart growth on the implementation of the State Development and Redevelopment Plan.

Full text of the proposal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

12:16-18.3 Transfer of predecessor's experience in part

(a) A predecessor employer and successor in interest may jointly make application, on Form UC-47 (Joint Application for Transfer of Employment Experience), for transfer of that portion of the employment experience relating to that part of the organization, trade or business, or assets acquired by the successor in interest. The employment experience will be transferred if the following conditions are met:

1. Either the predecessor or successor in interest shall report the transfer and acquisition [and its intention to apply for a partial transfer of the employment experience] within [four calendar months after the date of] **120 days from the date of acquisition.**

2. Both the predecessor and the successor in interest must complete and file form UC-47 within [30 days from the date of mailing thereof] **120 days from the date of acquisition.**

3. (No change.)

(b) (No change.)

(c) As used in this section, the term "distinguishable" means the portion of the organization, trade or business, or assets acquired by the successor in interest must be recognizable as distinct and different from the organization, trade or business, or assets remaining with the predecessor. The acquired portion must be able to operate as an employing unit apart and distinct from the predecessor, such as an entire operating division or a severed sales or production function.

(d) As used in this section, the term "identifiable" means the part of the organization, trade or business, or assets acquired by the successor in interest must have definitive characteristics that

separate it from the predecessor and it must be recognizable by those characteristics as unique and different from the predecessor.

(e) A successor in interest shall not be entitled to a partial transfer of employment experience and will be assigned the new employer rate if:

1. The predecessor in interest transfers a portion of business activity to form a new employing unit while maintaining ownership or control either directly or indirectly of the new employing unit, and

2. The portion of the organization, trade or business, or assets acquired by the successor in interest is not distinguishable and identifiable from the organization, trade or business, or assets remaining with the predecessor.